

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN L. SWIGER,)
Petitioner,) No. CV-05-0398-CI
v.) **ORDER ADOPTING REPORT AND**
ROBERT McKENNA, et al) **RECOMMENDATION**
Respondents.)

)

Magistrate Judge Imbrogno filed a Report and Recommendation on May 22, 2006, recommending Plaintiff's claims for habeas relief be dismissed with prejudice. (Ct. Rec. 18.) On June 1, 2006, Petitioner timely filed objections to the Report and Recommendation. (Ct. Rec. 19.)

Petitioner contends the factual record does not support Magistrate Judge Imbrogno's statement that the evidence presented was "equivocal" and had no effect on the jury's deliberations. (Ct. Rec. 19 at 2.) Although there were inconsistent reports of whether information concerning Petitioner's prior trial and conviction was actually discussed during deliberations, all of the jurors denied that the disallowed information affected their respective decisions.

Petitioner's argument relies primarily on juror Hancock's
ORDER ADOPTING REPORT AND RECOMMENDATION - 1

1 interview statement that the information was brought up during
2 deliberations. (Ct. Rec. 19 at 3.) However, Ms. Hancock denied the
3 unauthorized information had any impact on her decision-making.
4 (Ct. Rec. 18 at 20.) Taken as a whole, the jurors' interviews do
5 not indicate more than a vague recollection of information about
6 Petitioner's prior conviction from the newspaper or Mr. Hatfield's
7 testimony. Petitioner has not made an initial showing that the
8 extrajudicial information influenced the verdict; thus, a
9 presumption of prejudice is not triggered. *Caliendo v. Warden of*
10 *California Men's Colony*, 365 F.3d 691, 696 (9th Cir.), cert. denied
11 543 U.S. 927 (2004), citing *United States v. Day*, 830 F.2d 1099,
12 1103-04 (10th Cir. 1987) (stating that "[a] defendant must offer
13 sufficient evidence to trigger the presumption of prejudice").
14 Further, defense counsel opted for a curative jury instruction
15 regarding witness Hatfield's blurred statement, rather than a
16 mistrial. The instruction eliminated any prejudicial effect of the
17 contested testimony. Petitioner has demonstrated only *de minimis*
18 unauthorized communication, which did not create prejudice or
19 violate his constitutional right to a fair trial.

20 Petitioner also contends the Report and Recommendation errs in
21 recommending adoption of the state court's findings that
22 introduction of Exhibit 28 was a "legitimate strategy" by trial
23 counsel. As stated in the Report and Recommendation, "the more
24 appropriate question is whether the failure to redact the Exhibit,
25 intentionally or through inadvertent oversight by defense counsel,
26 constituted ineffective assistance." (Ct. Rec. 18 at 27.) The
27 Report and Recommendation assumes, for the sake of argument, that
28 ORDER ADOPTING REPORT AND RECOMMENDATION - 2

1 counsel's failure to redact violated the standard of care; however,
2 dismissal was recommended because Petitioner did not present "clear
3 and convincing" evidence to rebut the state court's finding that
4 there was no prejudice, because no juror testified that the
5 restitution reference was considered in his/her decision to convict.
6 (Ct. Rec. 18 at 27-28.) In his objection, Petitioner relied on his
7 opening petition and added nothing to show the prejudice prong of
8 the *Strickland v. Washington*, 466 U.S. 668 (1984), test was met.
9 The state court's finding was not rebutted by Petitioner's
10 objection. See 28 U.S.C. § 2254 (e) (1).

Having reviewed the May 22, 2006, Report and Recommendation (Ct. Rec. 18) and Petitioner's objections (Ct. Rec. 19), the court **ADOPTS** the Report and Recommendation in its entirety. Petitioner's Writ of Habeas Corpus is **DISMISSED WITH PREJUDICE**.

15 **IT IS SO ORDERED.** The District Court Executive is directed to
16 enter this Order and provide a copy to counsel.

17 ||| **DATED** this 13th day of July 2006.

18

19 s/Edward F. Shea
EDWARD F. SHEA
20 United States District Judge

21

22

23

34

25

86